IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE S.SIRI JAGAN

THURSDAY, THE 20TH SEPTEMBER 2007 / 29TH BHADRA 1929

WP(C).No. 19346 of 2005(C)

PETITIONER:

VILAYANCHATHANNUR SERVICE CO-OPEATIVE
BANK LTD. NO.F.1599, VILAYANNUR P.O., PALAKKAD,
REP. BY ITS SECRETARY.

BY ADV. SRI.P.B.SURESH KUMAR

RESPONDENTS:

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1. KERALA CO-OPERATIVE EMPLOYEES UNION
(CITU), ALATHUR TALUK COMMITTEE, ALATHUR,
REP. BY ITS SECRETARY.

2. V.KRISHNAN, THACHAMCHIKKAL VEEDU,
VILAYANCHATHANNUR, VILAYANNUR P.O., PALAKKAD.

3. LABOUR COURT, KOZHIKODE.

BY ADV. SRI.V.G.ARUN
SRI.T.R.HARIKUMAR
GOVERNMENT PLEADER SMT. M.R. SREELATHA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 20 /09 /2007 , THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

EXT.P1: TRUE COPY OF THE SHOW CAUSE NOTICE ISSUED TO THE WORKMAN.

EXT.P2: TRUE COPY OF THE PROCEEDINGS OF THE ENQUIRY OFFICER DATED 18.2.1995.

EXT.P3: TRUE COPY OF THE AWARD OF THE LABOUR COURT, KOZHIKODE IN I.D.NO.45/1994 DATED 28.10.2000.

EXT.P4: TRUE COPY OF THE DEPOSITION OF THE WORKMAN IN THE DOMESTIC ENQUIRY CONDUCTED AGAINST HIM DATED 7.1.1995.

EXT.P5: TRUE COPY OF THE AWARD OF THE LABOUR COURT, KOZHIKODE IN I.D.NO.79/1995 DATED 4/10/.2001.

EXT.P6: TRUE COPY OF THE JUDGMENT OF THIS HONOURABLE COURT IN O.P.NO.1996/2003, DATED 22/11/2004.

EXT.P7: TRUE COPY OF THE AWARD PASSED BY THE LABOUR COURT, KOZHIKODE IN INDUSTRIAL DISTPUE NO.79/1995 DATED 28/3/2005.

TRUE COPY

PA TO JUDGE.

S. SIRI JAGAN, J.

W.P.(C)NO.19346 OF 2005

DATED THIS THE 20th DAY OF SEPTEMBER, 2007

JUDGMENT

A Co-opearative Bank approaches this court challenging Ext.P7 award passed by the Labour Court in I.D.No.79/95, Kozhikode setting aside the punishment of compulsory retirement imposed by them of the 2nd respondent workman for misconduct of in- subordination proved in an enquiry conducted for the purpose and directing reinstatement with 50% backwages. Ext.P7 award is the second one passed in that I.D., since the earlier award in favour of the workman was set aside by this Court by Ext.P6 judgment and the matter was remanded for fresh consideration.

2. The contention of the petitioner is that the Labour Court after having found the workman guilty of misconduct of insubordination should not have interfered with the punishment especially since earlier by Ext.P3 award in I.D.No.45/94 the workman was found guilty of misconduct of misappropriation for which a lesser punishment of barring of five increments was

imposed on him. The petitioner points out that the Labour Court refused to take into account the earlier punishment only on the ground that in the show cause notice issued to the workman, that punishment was not mentioned. But the learned counsel for the petitioner points out that in Ext.P4 deposition of the workman himself before the enquiry officer he had categorically admitted that earlier such punishment was imposed on him for the misconduct of misappropriation. The contention is that in so far as the enquiry proceedings itself revealed the imposition of such earlier punishment, the fact that the earlier punishment was not specifically mentioned in the show cause notice for imposition of punishment would not prevent the management from taking into account that punishment also for the purpose of awarding punishment in the present case.

3. Further contention raised by the petitioner is that even assuming that the interference by the Labour Court on the punishment could be justified, the same should only have been without backwages and the award of 50% backwages was clearly misplaced. He would submit that when the finding of the guilt itself was upheld by the Labour Court,

reinstatement even if sustainable, should have been without backwages. In support of this contention the petitioner relies on the decision in **J.K. SYNTHETICS LTD VS. K.P. AGRAWAL AND ANOTHER [(2007) 2 SCC 433]**. On these contentions, the petitioner seeks setting aside of Ext.P7 award to the extent it interferes with the punishment of compulsory retirement imposed by the petitioner on the 2nd respondent workman.

4. On the other hand, the learned counsel for the workman vehemently opposes the contentions of the petitioner. He points out that the misconduct alleged against the workman is only a minor misconduct of submitting leave application falsely pretending to be ill which would not merit extreme punishment of compulsory retirement. He would further submit that only 50% backwages were awarded which by any stretch of imagination, cannot be considered as unreasonable. He also points out that he has been denied continuity of service in the award. On such submissions, the learned counsel for the 2nd respondent would support Ext.P7 award.

5. I have considered the rival contention in detail. I find considerable merit in the contentions of the petitioner that

simply because in the notice issued to the workman proposing punishment the earlier misconduct was not mentioned, that does not automatically disentitles the petitioner from taking into account that misconduct also for the purpose of imposition of punishment in the present case. I am of opinion that if the enquiry records reveal on the face of it such earlier punishment having been imposed on the workman, the management is certainly entitled to take that into account for the purpose of deciding the quantum of punishment pursuant to such enquiry. In his deposition before the enquiry officer, Ext.P4, which is not disputed by the workman, a very definite question has been asked in cross examination regarding the earlier misconduct and punishment. He had categorically admitted that in 1991 he had been punished by barring five increments for the misconduct of unauthorized absence and misappropriation of money. That being so, the enquiry proceedings themselves reveals the earlier punishment and therefore, the management was certainly entitled to take into account that punishment also for the purpose of imposition of the second punishment.

6. However, in this case I do not think that after all

these years I should interfere with the direction of the Labour Court to reinstate the workman. However, I feel that the direction to pay 50% backwages has to be interfered with. In this view, I am supported by the decision of the Supreme Court cited by the learned counsel for the petitioner in paragraphs 19 and 20 of the said judgment which read thus:

> "Decisions of the Supreme Court relating to back wages payable on illegal retrenchment or termination may have no application to the case like the present one, where the termination (dismissal or removal or compulsory retirement) is by way of punishment for misconduct in a departmental inquiry, and the court confirms the finding regarding misconduct, but only interferes with the punishment being of the view that it is excessive, and awards a lesser punishment, resulting in the reinstatement of employee
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> Where the power under Article 226 or Section 11-A of the Industrial Disputes Act (or any other similar provision) is exercised by any court to interfere with the punishment on the ground that it is excessive and the employee deserves a lesser punishment, and a consequential direction is issued for reinstatement, the court is not holding that the employer was in the wrong or that the dismissal was illegal and invalid. The court is merely exercising its discretion to award a lesser punishment. Till such power is exercised, the dismissal is valid and in force. When the punishment is reduced by a court as being excessive, there can be either a direction for reinstatement or a direction for a nominal lump sum compensation. And if reinstatement is directed, it can be effective either prospectively from the date of such substitution of punishment (in which event, there is no continuity of service) or retrospectively, from the date on which the

penalty of termination was imposed (in which event, there can be a consequential direction relating to continuity of service). What requires to be noted in cases where finding of misconduct is affirmed and only the punishment is interfered with (as contrasted from cases where termination is held to be illegal or void) is that there is no automatic reinstatement and if reinstatement is directed, it is not automatically with retrospective effect from the date of termination. Therefore, where reinstatement is a consequence of imposition of a lesser punishment, neither back wages nor continuity of service nor consequential benefits, follow as a natural or necessary consequence of such reinstatement. In cases where the misconduct is held to be proved, and reinstatement is itself a consequential benefit arising from imposition of a lesser punishment, award of back wages for the period when the employee has not worked, may amount to rewarding the delinquent employee and punishing the employer for taking action for the misconduct committed by the employee. That should be avoided. Similarly, in such cases, even where continuity of service is directed, it should only be for purposes of pensionary/retirement benefits, and not for other benefits like increments, promotions, etc. (para 19)

But there are two exceptions. The first is where the court sets aside the termination as a consequence of employee being exonerated or being found not guilty of the misconduct. Second is where the court reaches a conclusion that the inquiry was held in respect of a frivolous issue or petty misconduct,as a camouflag to get rid of the employee or victimise him, and the disproportionately excessive punishment is a result of such scheme or intention. In such cases, the principles relating to back wages, etc. will be the same as those applied in the cases of an illegal termination". (para 20)

5. In this case earlier, the 2nd respondent was found

guilty of misconducts of unauthorized absence and misappropriation of money. The misconducts proved against the workman in the present award are as follows:

> "(i) that on a particular day at 10 A.M. the workman attended work for about 20 minutes without signing attendance register and
> (ii) ignoring the lawful directions of the Secretary to accompany the Sale Officer as a ruse to keep away from duty he submitted a leave application falsely pretending ill and despite disallowing this leave application he willfully left the Bank and absented from duty for the remaining day".

I am satisfied that these misconducts are serious enough coupled with earlier misconducts proved against him at least to warrant denial of whole backwages to the petitioner.

6. In the above circumstances, while I do not interfere with the direction to reinstate the workman I modify the award holding that the workman will not be entitled to any backwages, but shall be given continuity of service.

The writ petition is allowed to the above extent.

S. SIRI JAGAN, JUDGE

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